

ORIGINAL
FILED
MAR 25 PM 3:17
CLERK OF DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

1 DAVID W. SHAPIRO (New York State Bar No. 2054054)
2 United States Attorney
3 JAY R. WEILL (California State Bar No. 75434)
4 Assistant United States Attorney
5 Chief, Tax Division
6 10th Floor, Federal Building
7 450 Golden Gate Avenue
8 San Francisco, California 94102
9 Telephone: (415) 436-7017
10 Fax: (415) 436-6748
11 JOSÉ FRANCISCO DE LEÓN (Florida State Bar No. 510180)
12 Trial Attorney, Tax Division
13 U.S. Department of Justice
14 P.O. Box 14198
15 Ben Franklin Station
16 Washington, D.C. 20044
17 Telephone: (202) 514-5040
18 Fax: (202) 514-9868
19 Attorneys for United States of America

PJH

20 UNITED STATES DISTRICT COURT
21 NORTHERN DISTRICT OF CALIFORNIA

22 IN THE MATTER OF THE TAX
23 LIABILITIES OF:

24 **CV 02...0046 -MISC.**

25 JOHN DOES, United States taxpayers
26 who, during the years ended
27 December 31, 1999 through
28 December 31, 2001, had signature
authority over VISA cards issued by,
through, or on behalf of banks or
other financial institutions in
Anguilla, Antigua and Barbuda,
Aruba, Bahamas, Belize, Bermuda,
British Virgin Islands, Cayman Islands,
Cook Islands, Cyprus, Dominica,
Gibraltar, Guernsey/Sark/Aldency,
Hong Kong, Isle of Man, Jersey,
Latvia, Liechtenstein, Luxembourg,
Malta, Nauru, Netherlands Antilles,
Panama, Samoa, St. Kitts and Nevis,
St. Lucia, St. Vincent and the
Grenadines, Singapore, Switzerland,
Turks and Caicos, and Vanuatu.

MEMORANDUM IN SUPPORT OF
EX PARTE PETITION FOR LEAVE
TO SERVE JOHN DOE SUMMONS

1 The United States of America, by and through its undersigned attorney, David W.
2 Shapiro, United States Attorney for the Northern District of California, respectfully submits the
3 following Memorandum in support of its *EX PARTE* PETITION FOR LEAVE TO SERVE JOHN DOE
4 SUMMONS:
5

6 INTRODUCTION

7 This is an *ex parte* proceeding brought by the United States of America, pursuant to
8 Sections 7609(f) and (h) of the Internal Revenue Code (26 U.S.C.), for leave to serve an Internal
9 Revenue Service "John Doe" summons upon VISA International. Section 7609(f) provides that a
10 summons which does not identify the person with respect to whose liability it is issued may be
11 served only after a court proceeding. These types of summonses are known as "John Doe"
12 summonses. Section 7609(h)(1) provides that a district court in which the person to be
13 summoned resides or is found shall have jurisdiction to hear and determine any proceeding
14 brought under Section 7609(b).^{1/} Section 7609(h)(2) provides that any determinations required to
15 be made under Section 7609(b) shall be made *ex parte* and shall be made solely on the petition
16 and supporting affidavits.
17
18

19 QUESTIONS PRESENTED

20 Whether, as required by Section 7609(f), the United States of America has demonstrated
21 (1) that the "John Doe" summons which the Internal Revenue Service desires to serve upon
22 VISA International relates to the investigation of an ascertainable group or class of persons; (2)
23 that there is a reasonable basis for believing that such group or class of persons may fail or may
24
25

26 ^{1/} VISA International has its principal place of business at 900 Metro Center
27 Boulevard, Foster City, in the County of San Mateo, California, within the jurisdiction of this
28 Court.

1 have failed to comply with any provision of any internal revenue law; and (3) that the
2 information sought to be obtained from the examination of the records or testimony (and the
3 identities of the persons with respect to whose liability the summonses are issued) are not readily
4 available from other sources.
5

6 DISCUSSION

7 The Internal Revenue Service is conducting an investigation to determine the correct
8 federal income tax liabilities, for the years ended December 31, 1999 through 2001, of United
9 States taxpayers who have signature authority over VISA cards issued by, through, or for banks
10 or other financial institutions in Anguilla, Antigua and Barbuda, Aruba, Bahamas, Belize,
11 Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Cyprus, Dominica, Gibraltar,
12 Guernsey/Sark/Aldeney, Hong Kong, Isle of Man, Jersey, Liechtenstein, Luxembourg, Malta,
13 Nauru, Netherlands Antilles, Panama, Samoa, St. Kitts and Nevis, St. Lucia, St. Vincent and the
14 Grenadines, Singapore, Switzerland, Turks and Caicos, and Vanuatu. In furtherance of this
15 investigation, the Internal Revenue Service has issued a "John Doe" summons to VISA
16 International, its affiliates and subsidiaries. As more fully explained below, the "John Doe"
17 summons relates to the investigation of an ascertainable group or class of persons, that is, United
18 States taxpayers who, during the years ended December 31, 1999 through 2001, had signature
19 authority over VISA cards issued by, through, or for banks or other financial institutions in the
20 jurisdictions listed above; there is a reasonable basis for believing that such group or class of
21 persons may fail, or may have failed, to comply with one or more provisions of the internal
22 revenue laws; and the information sought to be obtained from the examination of the records or
23
24
25
26
27
28

1 testimony (and the identity of the persons with respect to whose tax liabilities the summonses
2 have been issued) is not readily available from other sources.

3
4 Section 7601 of the Internal Revenue Code requires the Secretary of the Treasury to
5 "cause officers or employees of the Treasury Department to proceed, from time to time, through
6 each internal revenue district and inquire after and concerning all persons therein who may be
7 liable to pay any internal revenue tax." Section 7602 authorizes the Secretary to summon records
8 and testimony for that purpose. Specifically, Section 7602 authorizes the Secretary or his
9 delegate "[f]or the purpose of ascertaining the correctness of any return, making a return where
10 none has been made, [or] determining the liability of any person for any internal revenue tax . . .
11 [t]o summon . . . any person having possession, custody, or care of books of account containing
12 entries relating to the business of the person liable for tax . . . , or any other person the Secretary
13 or his delegate may deem proper, to appear . . . and to produce such books, papers, records, or
14 other data, and to give such testimony, under oath, as may be relevant or material to such
15 inquiry."
16
17

18 Section 7602 is the Internal Revenue Service's principal information-gathering authority,
19 and, accordingly, the courts have broadly construed it in light of its intended purpose of
20 furthering the effective conduct of tax investigations. Thus, the courts have repeatedly rejected
21 attempts to circumscribe or thwart the effective exercise of the Internal Revenue Service's
22 summons power. See, for example, United States v. Euge, 444 U.S. 707, 715-716, 100 S.Ct.
23 874, 63 L.Ed.2d 141, (1980); United States v. Bisceglia, 420 U.S. 141, 95 S.Ct. 915, 43 L.Ed.2d
24 88 (1976); Couch v. United States, 409 U.S. 322, 338, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973).
25
26
27
28

1 In Bisceglia, the Supreme Court held that Sections 7601 and 7602 empowered the
2 Internal Revenue Service to issue a "John Doe" summons to a bank to discover the identity of a
3 person who had engaged in certain bank transactions. This authority was subsequently explicitly
4 codified in Section 7609(f) of the Internal Revenue Code, as added by the Tax Reform Act of
5 1976. Section 7609(f) provides as follows:
6

7 Any summons . . . which does not identify the person with respect to
8 whose liability the summons is issued may be served only after a court proceeding
9 in which the Secretary establishes that -

10 (1) the summons relates to the investigation of a
11 particular person or ascertainable group or class of persons,

12 (2) there is a reasonable basis for believing that such person or
13 group or class of persons may fail or may have failed to comply with any
14 provision of any internal revenue law, and

15 (3) the information sought to be obtained from the examination
16 of the records (and the identity of the person or persons with respect to
17 whose liability is issued) is not readily available from other sources.

18 It is clear that, as required by Section 7609(f)(1), the group or class of persons to be
19 investigated here is ascertainable, that is, United States taxpayers who have signature authority
20 over VISA cards issued by, through, or for banks or other financial institutions in Anguilla,
21 Antigua and Barbuda, Aruba, Bahamas, Belize, Bermuda, British Virgin Islands, Cayman
22 Islands, Cook Islands, Cyprus, Dominica, Gibraltar, Guernsey/Sark/Aldeney, Hong Kong, Isle of
23 Man, Jersey, Latvia, Liechtenstein, Luxembourg, Malta, Nauru, Netherlands Antilles, Panama,
24 Samoa, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Singapore, Switzerland,
25 Turks and Caicos, and Vanuatu. Where the identities of the taxpayers are yet not known, no
26 greater specificity can be expected in defining the group or class of persons.
27

1 With respect to the second requirement, set forth in Section 7609(f)(2), the Declarations
2 of Revenue Agent Joseph C. West and Jack A. Blum clearly reflect a reasonable basis for
3 believing that the unknown persons whose identities are sought by the summonses may fail, or
4 may have failed, to comply with one or more provisions of the internal revenue laws.

5
6 In the first instance, money transfers between the United States and offshore tax haven
7 and financial privacy jurisdictions are inherently reasonably suggestive of tax avoidance, given
8 that tax avoidance is frequently the purpose for the use of banks in offshore tax haven
9 jurisdictions and financial privacy jurisdictions and that the secrecy and confidentiality
10 purportedly accorded banking transactions by such jurisdictions facilitate tax evasion. In United
11 States v. Pittsburgh Trade Exchange, Inc., 644 F.2d 302, 306 (3rd Cir. 1981), the court held that
12 the "reasonable basis" test had been met based upon a revenue agent's testimony that barter
13 transactions of the type arranged by the Pittsburgh Trade Exchange were "inherently susceptible
14 to tax error." In United States v. Richie, 15 F.3d 592, 602 (6th Cir. 1994), the court held that the
15 mere payment for legal services with large amounts of cash is a reasonable basis for the issuance
16 of a "John Doe" summons. Likewise, the use of credit or debit cards^{2/} to access funds transferred
17 by United States taxpayers to banks in the subject offshore tax haven and financial privacy
18 jurisdictions provides a reasonable basis for the issuance of the summonses at issue. As stated in
19 the Declaration of Jack A. Blum, at pg. 6: "because the summonses are limited to account
20
21
22

23 ^{2/} Offshore cards do not seem to offer any advantages to United States taxpayers
24 other than the promoted secrecy and tax considerations. Indeed, as recognized by William P.
25 Binzel, vice-president of government relations for MasterCard International, as reported in Don
26 Bauder, A credit card offer and your credit's lousy? Don't bite, San Diego Union-Tribune,
27 September 14, 1997, at I2: "people should be wary of a credit card issued offshore, he says.
28 That's because credit cards issued in the United States have strong legal protections that are not
available offshore."

1 information related to countries whose banks are known to market their secrecy as protection
2 from tax authorities, there will be a high likelihood that the summonses will generate the names
3 of individuals who failed to report their foreign bank accounts and the related income.”
4

5 In this regard, a recent law review article published in the Journal of Taxation is
6 instructive. In Advising a Client with Secret Offshore Accounts - Current Filing and Reporting
7 Problems, 91 J. Tax'n 158 (1999), Scott D. Michel, a past chair of the Committee on Civil and
8 Criminal Tax Penalties of the ABA Tax Section, describes the following “not atypical
9 hypothetical”:
10

11 In the spring of 1996, Richard Smith had a marvelous vacation on the
12 tropical island of Azure. While he was there, he attended a free seminar on
13 offshore banking and investing, where he heard about the many benefits of having
14 an Azure bank account, including the island's strict bank secrecy laws. Smith
15 opened an account at an Azure bank and deposited funds over the next three years.
16 The bank invested the money and provided him with a “debit” card to use for
“untraceable” cash advances and purchases. While Smith was careful to report all
of his domestic income on his tax returns for 1996 and 1997, he did not disclose
the existence of the Azure account or report the income earned in the account.

17 Mr. Michel then analyzes how the taxpayer in this hypothetical violated provisions of the Internal
18 Revenue Code, such as failing to comply with the disclosure requirements for foreign financial
19 accounts and willfully failing to report earnings on such accounts. Of course, implicit in the
20 hypothetical set forth by the writer of the article, is the use of the debit card as an integral
21 component of the tax evasion scheme.
22

23 In Our Client has “What?” A Discussion of Undisclosed Cash Hoards. Foreign
24 Bank Accounts, etc., American Law Institute - American Bar Association Continuing Legal
25 Education, Estate Planning Techniques, SF68 ALI-ABA 491 (Feb. 22, 2001), Sherwin P.
26 Simmons presents the following “fairly typical” problem:
27
28

1 Tom and Mabel have been married 36 years, have raised their children and had a
2 thriving construction business in Ohio. However, about six years ago, Tom had a
3 heart attack and was unable to maintain his construction business. As a result, he
4 sold it and came to Florida, got a general contractor's license, and has been doing
5 small construction projects in the bedroom communities around Miami. They
6 advised that four years ago some of their friends told them about a money-
7 making/tax-saving opportunity in which they were engaged. They attended a few
8 seminars and learned that they could obtain a Visa Card from a Cayman bank,
9 deposit their funds with the bank and then in effect live on their Visa card charges
10 (payment of the card charges being made through the funds deposited). This was
11 all done through an off-shore corporation established by an affiliate of the
12 Cayman bank which had as its officers and directors representatives of the
13 Cayman bank. The stock of the corporation were issued in bearer form and Tom
14 and Mabel's names were neither associated nor reflected in the corporate records.
15 As the years passed, most all of the income from the construction business was
16 transferred to their offshore account and neither this income nor any income
17 earned by the offshore account was reported.

18 About three years ago, Tom had an unusually successful year earning \$500,000
19 which he transferred immediately to the offshore account without reporting. He
20 then caused the offshore corporation (or as he would put it, the offshore
21 corporation's directors caused) the \$500,000 to be transferred to a brokerage
22 account in Miami to be invested for the benefit of the Cayman corporation.
23 Unfortunately, recent developments in the stock market have reduced the
24 \$500,000 [stake] to about \$180,000 currently. No investments have been sold, but
25 the investment manager is giving thought to making some sales and reinvesting.

26 Early on, Tom's friends and neighbors started asking him what he was doing for
27 his income inasmuch as they noticed his construction business was taking on
28 fewer and fewer projects. He advised them what he was doing and they
immediately became enthusiastic about participating. Tom agreed to assist them in
making the necessary arrangements and was soon sending their checks and
occasionally cash to the Cayman bank for their benefit.

As the assistance to friends and neighbors increased, Tom took note that the
Cayman bank affiliate which set up the Cayman corporations for the bank's clients
produced a tidy profit of \$1000 per corporation. Tom learned that the
establishment of a Cayman corporation was no big deal and he concluded that he
could set up his own Cayman services organization and to effect the formation of
the Cayman corporations for these friends and neighbors as well as other
investors. As a result, Tom set up his own Cayman corporation known as Pie In
The Sky Opportunities and started forming the Cayman corporations necessary to
the arrangement. Tom made a fair amount of money each year in this enterprise,

1 clearing about \$1700 per corporation inasmuch as his expenses were lower than
2 the Cayman bank's corporate affiliate's expenses.

3 Tom and Mabel were very happy with this relationship and were so comfortable
4 in their enterprise that Tom gave up his construction business completely.
5 Fortunately too, his health has improved and he and Mabel have been enjoying the
6 good life in South Florida. Admittedly, the income reported on their tax returns
7 which was modest would not support their lifestyle. To their good fortune, no one
8 has raised any questions about it and their accountant simply prepares their returns
9 with the information given to him. None of the information discloses any of the
10 Cayman arrangements.

11 Recently, a discordant note has crept into their lives. Tom and Mabel have read in
12 the press about the IRS' successful request of a local federal court for the issuance
13 of John Doe summonses to American Express Credit Card Company and
14 MasterCard seeking the names of taxpayers who have arrangements through
15 Cayman and other island banks similar to those of Tom and Mabel. Tom is not
16 overly concerned since the IRS did not ask for Joe Doe summonses with respect
17 to Visa cardholders, but, their general attorney thought that he should have some
18 advice from you regarding his situation.

19 Mr. Simmons then discusses the filing and reporting requirements of the internal revenue laws,
20 including the requirement that a taxpayer answer "yes" or "no" to the question: "[a]t any time
21 during [the calendar year], did you have an interest in or a signature or other authority over a
22 financial account in a foreign country, such as a bank account, securities account or other
23 financial account?" Failure to truthfully respond to this question can subject the taxpayer to
24 prosecution under 26 U.S.C. § 7206(1). Mr. Simmons notes that "[t]he failure to respond
25 truthfully to the foreign account question is an offense separate from the omission of income
26 from that account which itself can be punished under § 7201 as tax evasion and § 7206(1) as the
27 filing of a false return."

28 The Declaration of Revenue Agent West sets forth specific examples of court cases and
pending investigations reflecting that other known taxpayers have used or promoted the use of

1 cards to access funds held in banks in offshore tax haven and financial privacy jurisdictions as
2 part of schemes to evade the payment of taxes or otherwise fail to comply with the internal
3 revenue laws. The schemes involve the transfers of funds, not reported as taxable income in
4 federal tax returns, to these banks, and their eventual repatriation for tax-free use in the United
5 States through the use of cards for purchases or direct access to cash withdrawals. See United
6 States v. Brigham Young University, 679 F.2d 1345, 1349-50 (10th Cir. 1982), vacated for
7 consideration of mootness, 459 U.S. 1095, 103 S.Ct. 713, 74 L.Ed.2d 944 (1983) (prior audit
8 experience with other contributors that had overvalued "in kind" contributions was a reasonable
9 basis for issuing a "John Doe" summons for the identity of all "in kind" contributors to Brigham
10 Young University); United States v. Kersting, 891 F.2d 1407 (9th Cir. 1989) ("John Doe"
11 summons enforced after district court found "the existence of at least one case in which a Tax
12 Court found some of Kersting's programs to be abusive of the tax code." At pg. 1409. The Ninth
13 Circuit affirmed: "There was ample basis for believing that the persons about whom records were
14 sought had not complied with the tax law." At pg. 1412).

15
16
17
18 With respect to the third and final requirement, set forth in Section 7609(f)(3) – that the
19 information sought (and the identity of the persons with respect to whose tax liabilities the
20 summonses have been issued) is not readily available to the Internal Revenue Service from other
21 sources – it is clear that as a practical matter VISA International is the only source from which
22 the requested information can be obtained. Even if the taxpayers at issue have filed tax returns
23 with the Internal Revenue Service, their names are unknown, and, in fact, actual inspection of a
24 particular taxpayer's return is not likely to reveal understatements or misstatements of income
25 resulting from transactions concealed through the offshore transfers of funds or the failure to
26
27
28

1 report foreign accounts. Moreover, the information sought cannot be obtained from the offshore
2 banks as the subject offshore tax haven and financial privacy jurisdictions do not currently have
3 information-exchange treaties with the United States that would allow the Internal Revenue
4 Service to seek the requested information in connection with the pending tax investigation.
5

6 Accordingly, the requirements for service of the "John Doe" summons have been
7 satisfied in this proceeding. Indeed, in a similar proceeding commenced in the United States
8 District Court for the Southern District of Florida on October 18, 2000, In re John Does, No. 00-
9 3919 CIV-JORDAN (S.D. Fla.), in which the United States sought authorization to serve "John
10 Doe" summonses upon American Express Travel Related Services Co. and MasterCard
11 International seeking information regarding credit, charge and debit cards issued in Antigua and
12 Barbuda, Bahamas and Cayman Island, United States District Judge Adalberto Jordan issued on
13 October 30, 2000, an order granting the petition filed by the United States. A copy of this order is
14 attached to the Exhibits Appendix to the Declaration of Revenue Agent West at Tab **. Judge
15 Jordan found that the United States had established the requirements of Section 7609(f) and
16 authorized the service of the "John Doe" summonses to American Express and MasterCard.
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

For the foregoing reasons, the Court should enter an order granting the Internal Revenue Service leave to serve a "John Doe" summons upon VISA International in substantially the form as attached to the Exhibits Appendix to the Declaration of Revenue Agent West at Tab 1.

DAVID W. SHAPIRO
United States Attorney

JAY R. WEILL
Assistant United States Attorney
Chief, Tax Division
10th Floor, Federal Building
450 Golden Gate Avenue
San Francisco, California 94102
Telephone: (415) 436-7017
Fax: (415) 436-6748

By: 

JOSÉ FRANCISCO DE LEÓN
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 14198
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 514-5040
Fax: (202) 514-9868
E-mail: jose.f.de.leon@usdoj.gov